attention on this aspect after June 1982, and, in giving evidence, she informed the court that she considered herself to have been cured, her complaints had not affected her work and had not prevented her from being promoted. In all the circumstances, I do not feel justified in acceding to the submission to award additional damages under another head of claim. I am of the view that, in addition to the agreed special damages of $8,200, a fair award for general damages should be $15,000. She should have interest on both sums at 6% pa from the date of the writ to the date of judgment.

The first and second defendants have admitted liability as to 65% by the first defendant and as to 35% by the second defendant. The first, second and third plaintiffs should also have their costs.

Order accordingly.

Solicitors: *Murphy & Dunbar*; *Donaldson & Burkinshaw*; *Leong & Gay*.

Reported by *Terence Tan Bian Chye*

BRUNEI REPORTS

Hanshim Corp Sdn Bhd v New York Plastic Co Pte Ltd

COURT OF APPEAL (BANDAR SERI BEGAWAN) — CIVIL APPEAL NO 5 OF 1989
D CONS AG PRESIDENT, HUNTER AND BOKHARY COMMISSIONERS
16 NOVEMBER 1989

Contract — Building contract — Agreement by parties to undertake sub-contracting work — Terms of payment — Payment for 'additional work' — Whether 'additional work' or requests for extra work part of sub-contract agreement

Civil Procedure — Appeal — Questions of fact decided by trial judge — Duty of appellate court in reviewing trial judge's conclusions

Words and Phrases — 'Additional work' — Meaning of in building contract

The plaintiffs and defendants had agreed to bid for steel and metal sub-contract work for an extension to the Brunei International Airport, upon the basis that the defendants would be the nominal sub-contractors, while the work should be done by or on behalf of the plaintiffs. The defendants were to receive a commission of 12% of the cost of the work. The defendants were appointed as sub-contractors. There was no formal sub-contract document and no provision was made permitting variations without vitiation of the contract or for the valuation of extra work. The basic obligation of the sub-contractor was to carry out the works specified and priced in the bill of quantities prepared by the main contractor, at the rates stated, subject to final measurement.

The defendants invited the plaintiffs to perform the work, by a letter which is identical in terms to the letter they had received from the main contractor. This letter was accepted by the plaintiffs subject to a variation which provided that the plaintiffs would pay the defendants 12% commission based on an amount not exceeding the estimated bill of quantities ('BQ') figures.

Further, 'additional work amount exceeding estimated BQ quotation shall be paid a commission of 10% only'. The plaintiffs in turn sub-contracted the work to another contractor.

The dispute between the parties centred on the final account as between them. The plaintiffs claim, inter alia, for unauthorized payments that had been made by the defendants to the sub-contractor who had actually done the work, and damages measured by 10% of the cost of the additional work, arising from the defendants' failure to inform them of requests for such work, under the agreement.

Held, dismissing the defendants' appeal:

(1) The defendants had agreed to the final account with the main contractor without any reference at all to the plaintiffs, despite the relationship between them. This was because much of the final account dealt with additional work which had been concealed from the plaintiffs.

(2) The appellate court was satisfied that the lower court was correct in its finding that no authorization had been given by the plaintiffs to the defendants for payments to be made to the sub-contractor engaged by the plaintiffs to do the work. The trial

judge had seen and heard the witnesses and had rejected the evidence of the defendants, in view of the circumstances surrounding these payments.

(3) The sub-contractor's obligation was to execute the works described and priced in the extracts from the BQ. The quantities for such works and the contract price, were only estimates. They would fluctuate with additions and omissions arising from the differences between estimated and actual final quantities. This obligation is in addition to that imposed upon the plaintiffs to pay '12% of the total cost of this contract'. This means total cost of the actual work as measured, not the total cost of the contract price.

(4) Extra or additional works were in the contemplation of the parties at the time of the agreement. The BQs also indicated that additional work was necessary. This additional work could only have been done by the plaintiffs, at the time of the contract.

(5) The court found, from the circumstances, that 'additional work' meant that the parties' intention was to pass on from the defendants to the plaintiffs the whole sub-contract function including the performance of the additional works. Part of the obligation under the contract was that extra works invited by the main contractor would be tendered for, and undertaken by the plaintiffs at the best rate they could negotiate with the main contractor, out of which they would pay the defendants 10%. Part of the consideration for this payment was that the defendant would pass on to the plaintiffs all such requests for extra work.

(6) The only basis for the award of damages is 10%, as, if the contract had been properly handled, the plaintiffs were entitled to 10% for the additional works carried out.

Cases referred to

1 *Powell & Wife* v *Streatham Manor Nursing Home* [1935] AC 243 (folld)
2 *Watt* v *Thomas* [1947] AC 487 (refd)

Ronnie Lee Pui Man for the plaintiffs.
Theodore Douglas Lind for the defendants.

Cur Adv Vult

Hunter Commissioner (delivering the judgment of the court): On 5 September last, the Chief Justice gave judgment for the plaintiffs, New York Plastic Co Pte Ltd ('NYP') for the sum of $93,561.92 interest and costs on its claim against the defendants, Hanshim Corporation Sdn Bhd ('Hanshim'). From that judgment, the defendants, Hanshim appeal.

We are concerned in this case with sub-contract work carried out at the Brunei International Airport Extension. The main contractors for that work were Leighton Ted Joint Venture ('LT'). It is apparent that in or before September 1985, the parties jointly decided to bid for certain steel and metal sub-contract work on that job, upon the basis that Hanshim should be the nominal sub-contractors, while the work should be done by or on behalf of NYP, and that for their services in lending their name in this way, Hanshim was to receive a commission of 12% of the cost of work.

This resulted in the appointment of Hanshim as sub-contractors by LT by letter dated 20 September 1985. The scope of the sub-contract can be seen from the heading to the letter where it is described as 'sub-contract for steel framework, stainless steel works, aluminium works and galvanised steel works'.

The contract is contained first in this letter. Secondly, and most significantly, in extracts from bill of quantities plainly prepared by LT and priced by the parties collectively, and priced in such a way as to ensure that there would be sufficient profit to satisfy Hanshim's commission and NYP themselves. Thirdly, there was a specification of works; and fourthly a list of drawings and programme of works.

There was no formal sub-contract document. There was no contract which made express provision permitting variations without vitiation of the contract, and which also made provision for the valuation of such extra works. The basic obligation of the sub-contractor under this contract was to carry out the works specified and priced in the bill of quantities, at the rates therein stated, subject to final measurement.

As I said, Hanshim never considered performing this work themselves. So the next day, they invited NYP to perform this work by letter dated 21 September which is identical, except at the end, in its terms to the letter they had received from LT. At the end, in sub-cl (f) under terms of payment, one finds the new clause which in effect provides:

> NYP shall pay commission to Hanshim of 'not less than 12% of the total cost of this contract', and that payment was to be deducted from every progress payment to be made monthly by LT to Hanshim.

That provision was not wholly acceptable to NYP. Certain documents followed and after discussions in Singapore two things happened on 19 October of that year. (I should explain that Hanshim is a Brunei company and NYP, a Singapore company.) First, the New York Plastic Co Pte Ltd signed their acceptance of the letter of 21 September. This was subject to the variations contained in a letter of 19 October. The variation which is material for our purposes is para 3 which reads:

> Commission: New York Plastic Co Pte Ltd shall pay Hanshim 12% commission basing an amount not exceeding estimated BQ figures. Additional work amount exceeding estimated BQ quotation shall be paid a commission of 10% only.

It is the construction of that provision which has occasioned most dispute in this litigation.

NYP itself in turn sub-contracted the performance of the whole of this work orally to a sub-contractor by the name of Low Soon Lai. We only know that this contract was oral. Its basis seems to have been similar to the basis of the sub-contract between the parties. The result of this exercise was that out of every payment to be received by LT, 12% was to be retained by the defendants, Hanshim,

9% by the plaintiffs, NYP, and 79% by the man doing the job, Low Soon Lai.

As far as performance is concerned, I can concentrate upon the events which have given rise to the dispute. The work seems to have started as per the programme in late 1985 or early 1986. It was all done by Mr Low. The plaintiffs only occasionally had a representative on site in Brunei, that representative being a Mr Wong who was their contract manager. Both contracts had provided for monthly progress payments. The first that we have in our documentation is in fact No 2 dated 21 April 1986. Questions then arose as to how these programs made by LT to Hanshim were to be dealt with. Hanshim was entitled to deduct its 12%, but how should it pay over the balance?

Early in the contract, NYP gave Hanshim an open authority to make all payments direct to Mr Low, but it seems they regretted that quite quickly. There were apparently issues of money and indebtedness which then existed between themselves and Low. No doubt in order to maintain closer control over events, on 21 May, they revoked this original authority, and from that moment on, Hanshim no longer had general authority to make payments to Low. That was acted upon for a number of months. Thus one finds in July Hanshim seeking by telex express authority from Mr Wong who was then in Brunei to make payment and that authority was given by reply telex. On two other occasions we have telexes of 8 September 1986 and 10 November 1986 authorizing payment by Hanshim to Low of two quite substantial sums, $62,099.92 on the first occasion, $106,903 on the second.

At exactly the same time and later, four payments were made by Hanshim to Low without written authority being sought or given. Those payments totalled $140,694.66. They are made up of the following payments:

6 August 1986	—	$18,483.62
6 December 1986	—	85,016.22
9 January 1987	—	32,512.78
9 February 1987	—	4,682.04

At the trial, the defendants, Hanshim, claimed the right to deduct this total sum in its final accounting with NYP, upon the basis that these sums have been received by them, albeit paid to Low. This was challenged by the plaintiffs upon the basis that those payments were not authorized in fact. The authority relied upon at the trial by Hanshim was an alleged, oral authority given on the telephone immediately preceding each such payment. That was disputed, and it was the first disputed issue of fact for the trial judge. The second disputed issue, which is in fact difficult wholly to distinguish from the first, related to additional work. Not unexpectedly, as the work proceeded, LT asked for extra work to be carried out. We do not know precisely when this first happened, but there is certainly a quotation for potential extra work dated June 1986. We do know that by 19 September some extra work, and it may have been the first extra work, had been performed because on that date, two progress payment claims were submitted by Hanshim to LT.

The first was Progress Payment No 7. That related to work stated in the bill of quantities and was copied to NYP. The second was Progress Payment No 7A which comprised solely extra work and was not copied to NYP. This was possibly the start of a policy of concealment deliberately adopted by Hanshim and Low. It was apparent that all requests for extra work when received by Hanshim from LT were passed to Low, his figure obtained and then submitted by Hanshim to LT; and whenever accepted that work was carried out by Low. The payment split they operated in respect of these items was that 12% was retained by Hanshim and 88%, the balance, was passed on to Low. It was given in evidence by the plaintiffs' first witness and not challenged that had the matter been dealt with differently through NYP, the split would have been 10% to Hanshim, 10% to NYP and 80% to Low.

By late 1987, all the work, contract and extra, was completed, and on 14 November, Hanshim agreed with LT a final account. This shows basically two things. First, allowing for additions and omissions on remeasurement, the estimated contract price of $1.008m had come down to $982,794.42; and secondly, additional works totalling not less than $705,953.73 had been carried out. To my mind, one of the most remarkable features of this case was that Hanshim agreed to this final account with LT without any reference at all to NYP despite the relationship which existed between them. They agreed to all the items of remeasurement which could directly affect the underlying contractual obligation without reference at all to one of those parties. But of course that was forced upon them, because so much of the final account dealt with additional works, the existence of which had been carefully concealed from NYP throughout.

This action was started by a writ and statement of claim in July and August of 1988, raising a number of claims by NYP. They were at that time very largely in the dark having no knowledge of this final account, which incredibly was kept from them until the eve of the trial itself. But on the eve of the trial it was disclosed, and at the trial three factual issues emerged for determination by the Chief Justice. The first was the value of materials supplied by LT which LT was entitled to deduct against all the subcontractors. On that issue, he decided against the plaintiffs. The second was the issue of authority to pay this $140,694.66 to Low. On that issue he decided against the defendants which produced a net figure owing by the defendants to the plaintiffs of $22,966.55 on the final account which could then be written between the parties.

The third issue was the defendants' liability to pay damages measured by 10% of the cost of the additional work by its conduct in denying the plaintiffs the opportunity of executing those works. On that issue, he decided also in favour of the plaintiffs and awarded 10%, namely, $70,593.77.

I deal with the first of those issues. What is now said is that the trial judge should not have accepted the plaintiffs' evidence in respect of those telephone authorizations and should on the other hand, have accepted the defendants' evidence that these telephone authorities were given. Now, this plainly was a question of fact for the trial judge. The Chief Justice saw and heard the witnesses on both sides. He heard Mr Wong for the plaintiffs who said he gave no such authority. He heard Mr Lee and Low giving some evidence for the defendants in support of the existence of that authority.

The Chief Justice rejected the evidence of Mr Lee and Low. He was plainly influenced in this as any court would be by the glaring contrast between the immediate post revocation procedure of seeking and obtaining by telex written authority for the making of these payments and the total silence in relation of these telephone authorities, which were not even confirmed by telex after the event. There were other curious features about these payments. One was the form of the vouchers; and secondly was the fact that they coincided with the commencement of the concealment of the extra works.

As to the proper test for an appellate tribunal in such circumstances, I am very happy to take the test first formulated by Lord Shaw in a Scottish case as long ago as 1919, and cited with approval by Viscount Sankey LC in *Powell and Wife* v *Streatham Manor Nursing Home*[1] at p 249. Lord Shaw expressed the duty of the appellate judge in these terms:

> In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, 'Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong?' If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

I put that question to myself. I am very far from satisfied that the Chief Justice was plainly wrong. Indeed, at its lowest, I would say in my view, he was probably right. So the challenge to that finding, in my judgment, fails.

I then turn to the issue about additional works. It is convenient to start here with the basic terms which were common, indeed, identical in both the LT and Hanshim sub-contract, and the Hanshim and NYP sub-contract. Three propositions I think can be stated quite simply with respect to that. First, the sub-contractor's obligation was to execute the works that were both described and priced in the attached extracts from the bill of quantities at the respective rates set out against such work. Secondly, the quantities for such works given in the bill of quantities were estimates only. The sub-contractor's obligation was to execute such quantities as were required by LT, whether more or less than those estimated, in return for payment calculated at these rates on the final measured work. Thirdly, the contract price of $1,008,107.70, which was based upon estimated quantities, was also only an estimate. It would fluctuate by reason of both additions and omissions arising from the differences between the estimated and actual final quantities.

It follows in my judgment that when you add to that obligation the provision of cl (f) found in the letter of 21 September from Hanshim to NYP, which imposed upon NYP an obligation to pay '12% of the total cost of this contract', that means the cost of the contract as adjusted on final measurement. It means total cost of the actual work as measured; not the total cost of $1,008, 107.70m. It is against that background that one has to consider the crucial question as to what meaning is to be attributed to cl 3 of the letter of 19 October.

The rival contentions as to that are these: Mr Lind for Hanshim submits that the parties did not have additional works or extra works in mind at that time at all. The only thing they had in mind was variations of quantities and particularly additional quantities. He invites us to read the words 'additional work' as relating only to additional quantities. He says that what the parties were considering was the position if the ultimate quantities as measured exceeded the quantities provisionally contained in the bill of quantities so that the measured price exceeded $1,008, 107.70m. That is all this clause is related to, and its sole content is that the percentage dropped from 12% to 10% only in those circumstances.

Two things follow from this. First, this clause has very little content indeed. The basic variations of quantities were already covered by the original cl (f). This clause will only bite in the somewhat remote event of massive under-measurement, or under-estimation of measurement, in the original bill of quantities. Secondly, it is difficult to give any apparent reason for the clause so construed. No obvious reason occurs to me why, in the event that actual measurements exceeded the bill measurements all round, for the performance of precisely the same work there should be a difference in the percentage of commission.

By contrast, Dr Lee for NYP submits that additional work means what it says: that this is a well-recognized phrase in building contract parlance. It means work which is not covered by the bill of quantities; either because it is

not priced in those bills or is not specified in those bills. It is work which is different in kind from that contained in the bills. He submits that the parties expected such work to arise on a large contract of this nature.

The intent of this sub-contract, he suggests, was to pass on the whole sub-contract function to NYP in relation to works within the basic sub-contract description, namely, steel frameworks, stainless steel works, aluminium works and galvanized steel works. There was only one party ready able and willing to perform that work at the time, and that was NYP. Hanshim was to continue to be the nominal sub-contractor in the eyes of LT. It was to receive all inquiries for extras and all instructions for extras. It was then to transmit those enquiries and instructions to NYP, and for this service, it was to receive 10% of that cost. This is the basic issue between the parties and it is common ground that we must construe the language that they have used in the light of all the circumstances known or apparent to them at the time.

What are the relevant circumstances and the relevant consideration in relation to extras or additional works? The first question is were they in the parties' contemplation at the time? It seems to me the answer here is plainly 'Yes'. In the course of his evidence, Mr Cheok, the quantity surveyor, in charge of the site on behalf of LT, said this:

> I expect there will be variations and that there will be additions in a big job like this.

In saying that, he was, I think, giving expression to no more than the views of any experienced contractor or sub-contractor in these circumstances.

We do not know the precise terms of the main contract between LT and the Brunei government in its capacity as building owner. But it can be asserted with some assurance that that contract must have contained the usual provision permitting variations without vitiation of the main contract, and also providing machinery for the valuation of such variations usually by third party valuation. It is absolutely inevitable in large complicated jobs like this that there will be some changes of mind, some second thoughts, originating either from building owner or LT itself.

One only has to look at the bill of quantities as priced by the parties to see internal indications that additional works were in contemplation. First, a number of items were priced as 'supply only' where the bills provided for both supply and installation. These examples are to be found on pp 118, 122 and 124. This clearly show that the parties were only prepared to commit themselves to a supply price in the certain knowledge that LT was also going to require installation. This was an obvious source of anticipated extra work, which in at least one case, and may be in others too, turned into additional work done. Secondly, in two instances in the bill on pp 124 and 129 one finds this manuscript entry 'to supply catalogue' as against the items 'stainless steel suspended ceiling'.

This seems to me clearly to indicate that the parties anticipated further detailed pricing to be submitted for suspended ceiling work. Therefore, it came as no surprise to me to notice that a number of extra work items arise in the documents in relation to suspended ceilings. Thirdly, there are a number of unpriced items in the bill which plainly fall within the ambit of this specialist sub-contract function. I pick out only two, some 'mild steel' items on p 126 and a number of 'dropped ceiling' items on p 127. The latter in particular figured substantially in the extra works performed. Therefore, it seems to me apparent that these experienced contractors were perfectly aware that extra items were likely to arise on this job.

The second question which then arises is who could execute this work? At the time of the contract, this can receive only one answer. It could only have been NYP. This situation only changed in the course of the work, when, from the plaintiffs' viewpoint, the defendants were able to suborn Low from his loyalty to them.

The third question which the parties would have to consider at the time was: was any attempt to be made to execute this work? Again this admits of only one answer. First, the parties were in business to make money. Secondly, I think it is notorious amongst building works that 'extras' are a legitimate source of profit. Thirdly, there was no machinery in this contract for the valuation of 'extras'. The parties were free to make the best bargain they could with LT. The quoted prices that were in the bill of quantities already had built into them, as we have seen, a sufficient profit margin to allow for the 12% to Hanshim and 9% to NYP, as well as sufficient to satisfy Low. There must have been a 30% profit margin built into those prices. They could not be assured of achieving quite such a good bargain with LT in respect of the extra items. That was perhaps a good reason to reduce the commission from 12% to 10%. By contrast, I look in vain for any reason to reduce the commission from 12% to 10% on the basis of the construction of cl (3) which Mr Lind urged upon us.

In these circumstances, for my part, I have no doubt that the word 'additional work' was used quite precisely and peculiarly to mean what it said: that the parties' intention here was to pass on from Hanshim to NYP the whole sub-contract function including this prospect of the performance of extra works. That is why they went to the trouble of pricing it in their contract. Part of the obligation under this contract was that any extra works invited by LT would be tendered for, and if possible undertaken by NYP at the best rate they could negotiate with LT out of which they were to pay 10% to Hanshim. Part of the consideration for the 10% payment to Hanshim was that Hanshim would pass on to NYP all such requests for extra work.

For my part, I am quite satisfied in my own mind that the defendants, Hanshim, were well-aware and conscious of this obligation. It is the only explanation that I can see for the secrecy surrounding their dealings with Low in relation to these extras; for the splitting of the progress payments into 'numbers' and 'A numbers', some of which were copied and some of which were not copied; and for their concealment of the final account from NYP; their agreeing to it with LT without reference to NYP at all; and for their concealment of it until eve of the trial. In my judgment, the Chief Justice was quite correct in holding Hanshim in breach of its obligation under this contract.

The last point taken by Mr Lind, is that the Chief Justice should not have awarded 10%. For my part, I cannot see how he could have arrived at any other figure. The unchallenged evidence before him was had the contract been properly handled, the split would have been 10-10-80. As I have already indicated, 10% therefore seems to me the only possible basis upon which damages could be assessed and awarded. For my part, I would therefore dismiss this appeal.

D Cons Ag President: I agree with Mr Commissioner Hunter. As the reasons which have led him to his conclusions so nearly coincide with those that I have drawn up for myself, I do not think that anything useful would be achieved by giving what would in effect be little more than mere repetition of what has already been said. I too would dismiss the appeal.

Bokhary Commissioner: I am also in complete agreement with the judgment delivered by my Lord, Mr Commissioner Hunter. However, out of deference to the arguments that we have heard over two days, I would add merely this. In so far as the case turns on issues of fact, I do not think that the learned Chief Justice, who had the advantage of seeing and hearing the witnesses, made any such error in his approach to, or appreciation of, the evidence as to justify an appellate court considering any of the issues of fact as being 'at large', to use the expression used by Lord Thankerton in *Watt* v *Thomas*.[2]

But even if we were to regard the issues of fact as being at large, the inherent probabilities of the case appear to me to support the learned Chief Justice's conclusions.

In so far as the case turns on a question of construction, I am fully satisfied that the construction placed on the relevant documents by the learned Chief Justice is the correct one. The contrary construction valiantly advanced by Mr Lind runs into difficulty at the very outset, in that it requires the formula 'additional work' to be given a meaning other than its ordinary meaning.

As I have said, I am in complete agreement with the reasons given by my Lord, and I too would dismiss the appeal.

D Cons Ag President: In our opinion, no order is necessary except that the appeal is dismissed with costs to be taxed if not agreed.

Appeal dismissed.

Solicitors: *Douglas Lind & Co; Ibrahim Chee & Co.*

Reported by *Zarinah Marican*